

**PUBLIC INTEGRITY COMMISSION  
NON-CONFIDENTIAL MINUTES  
November 19, 2019**

**1. Call to Order:** 10:00 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Andrew Manus, Gary Simpson, Rourke Moore. Commission Counsel: Deborah J. Moreau, Esq.

**2. Approval of Minutes for October 15, 2019:** Approved with correction to grammatical error on page three, paragraph four. Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote 6-0, approved.

**3. Administrative Items**

A. COGEL trip—No December meeting.

B. State nepotism policy. The Commission discussed whether a statewide policy would serve the needs of agencies that vary greatly in size and operations.

**4. Motion to go into Executive Session<sup>i</sup> and Hear Requests for Advisory Opinions, Waivers and Referrals:** Moved—Commissioner Simpson; seconded—Commissioner Whetzel. Vote 6-0, approved.

**5. Investigation**

Commission Counsel advised the Commissioners that [an entity] had asked the PIC to investigate allegations raised by a former employee. Commissioner Whetzel advised that her husband had represented the [entity] in the past but that she did not know, and did not discuss, the subject of the representation with her husband. Commission Counsel advised that she [had distant acquaintances familiar with the facts involved]. No requests for recusal for either Commissioner Whetzel or Commission Counsel. Commission Counsel will conduct the investigation and report back to the Commission when complete.

**6. Updates on various matters being worked on by Commission Counsel**

Commission Counsel advised the Commissioners that PIC had received a letter inquiry from [an interested party about a State] program and its funds. Commission Counsel reached out to the [Agency] to obtain records from the program.

Commission Counsel advised the Commissioners about a meeting at Legislative Hall. Numerous elected and appointed officials had been contacted by a retired State employee. [Employee] will submit a complaint to the PIC regarding nepotism and conflicts of interest by the [Director of the Employee's former Division]. Many of the issues discussed at the meeting were related to Human Resources procedures. [Employee] will submit a complaint to the PIC in which her allegations focus on conflicts of interest and nepotism.

[An elected official], who appeared before the Commission in July 2019, reached out to [a State Representative] to try to get the Code of Conduct's conflict of interest provision amended by the legislature to conform with his interpretation of the statute. Commission Counsel spoke to [the

Representative] and explained the reason for the request and the reasoning that supports the Commission's interpretation of the statute. [The elected official] may try to reach out to other legislators during the upcoming session.

## **7. 19-38—Post Employment**

[Employee] was the Assistant Division Director of [a State agency]. He was responsible for managing the agency's capital improvement projects throughout the State. He retired from State service at the end of November 2019.

[Employee] planned to open his own management consulting firm after his retirement. He expected to contract with State agencies, including [his former Agency], other consulting businesses and/or contractors. He anticipated that his business would focus on [tasks similar to those he performed for his former employer].

[Employee] asked the Commission how the ethics rules would affect his ability to work as an [Agency] consultant or as a consultant for one of [Agency]'s contractors.

**For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State.**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a matter while with the State, then he was not "directly and materially responsible" for that matter. In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Similarly, this Commission has held that the facts must overlap substantially.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the proposed post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while employed by the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission has approved post-employment positions for [Agency] workers who left State employment to work for one of the agency's contractors so long as they did not work on the same projects. The Commission is to strive for consistency in its opinions.

As the Assistant Division Director, [Employee]’s state job duties required him to oversee all [of the Agency’s] capital improvement projects. Consequently, he was materially responsible for most, if not all, capital projects in the State. As a result, it was very unlikely that he could parse out projects to work on for which he was not previously materially responsible. That limited his new business to working only on non-capital [Agency] improvement projects, new [Agency] projects that were initiated after his separation from the State, work for other State agencies and any projects outside the State of Delaware. [Employee] could not work on any of the capital improvement projects which were initiated during his tenure at [Agency], including [a large project] which was scheduled to begin construction in March 2020. Although construction of that project hadn’t been started at the time of [Employee]’s meeting with the Commission, he admitted to the Commission that he had commented on the project’s plans and specifications and that his employees had also been involved in the project. The Commission’s reasoning applied equally to [Employee] and to companies that he owned. That meant that the restrictions applied equally to new employees that [Employee] intended to hire over the next two years.

In addition, [Employee] was advised that he could not meet with any [Agency] bid committees for a period of two years, lest the public think he was trying to leverage his relationships with his former co-workers and colleagues. Unlike to the restriction cited above, [Employee]’s workers could meet with [Agency] bid committees if they had not been employed by [the Agency] in the past two years.

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State.

Motion—[Employee]’s new business would not violate the two-year post-employment restriction in the Code of Conduct as long as he abided by the advice in his letter opinion. Moved—Commissioner Manus; seconded Commissioner Smith. Vote 6-0, approved.

## **8. 19-39—Private Interest**

[Employee] was a Treatment Coordinator for [a Division] within [a State Agency]. She was responsible for case management and coordination of services for her client’s and their families. She did not provide direct care to the clients. She had recently received permission from her supervisor to work a modified work schedule. Instead of the traditional Monday through Friday work week, she would work longer hours on Monday through Thursday so that she could work a half day on Fridays.

[Employee] also owned her own counseling business. She contracted with another company to provide financial billing services. Her clients were referred to her from both the private and the public sectors and she only accepted adult clients. [Employee] was made aware of a counseling position which required the counselor to speak English and Spanish. If she accepted the position, she would counsel the children on-site. [The facility provided services] for children ages 4 through 11.

[Employee] asked the Commission if her private work at [the facility] would create a conflict of interest with her State position.

### **1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them.**

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” Rather, it recognizes that a State official can have a “personal or private interest” outside

those limited parameters. It is a codification of the common law restriction on government officials. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.

It was unlikely that [Employee] would encounter her State clients while working at the [facility] and vice-versa because both sets of clients were of differing age demographics. [Employee]'s State clients were adolescents. At the [facility], her clients would be primarily aged 4 through 11. [Employee] had spoken to her State supervisor about her interest in the [outside] position. [Employee] stated that in the unlikely event she was to encounter one of the [facility's] clients, or members of their families, while working at her State job, she would recuse herself from working with that client or their family. She stated that there were other Treatment Coordinators in her Division to whom the client could be assigned. In addition, her supervisor had agreed to let [Employee] work a modified schedule so that she could work at the [facility] on Friday afternoons. However, [Employee] should recuse herself from working with any [of the facility's] clients if she had contact with the client or their family while performing her State job duties.

As long as [Employee] abided by the above-cited recusal strategies, it was unlikely that she would be required to review and dispose of matters related to a State client while performing the [facility's] job duties and vice-versa.

## **2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. The Commission treats that as an appearance of impropriety standard. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment.

As long as [Employee] recused herself as necessary, her dual roles were unlikely to create a justifiable impression of a violation amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] preemptively addressed this issue by modifying her work schedule to allow one afternoon per week to perform her private job duties.

Motion—[Employee]'s part-time employment at [the facility] would not create a conflict of interest with her State job duties as long as she followed the recusal strategies described above. Moved—Commissioner Manus; seconded Commissioner Simpson. Vote 6-0, approved.

## **9. 19-40—Outside Employment**

[Employee] worked for a State [Agency] as an Accountant. Her job duties included: paying [Agency] bills, participating in budget management, etc. [Employee] was not involved with the [Agency]’s oversight of [a specific industry].

[Employee] also worked part-time for a [private employer] that is regulated by the State. The [private employer] was recently sold to a new owner and the new management was requiring their [employees to work in additional facets of the business]. As a result, a license is now required of all [current employees], regardless of whether they [worked in the specific area that required a license]. To obtain a license, individuals must complete a thorough application process, which includes a review of their criminal history by [a Division within a different Agency]. [The Division] reviewed [Employee]’s application for a license and recommended that the application be approved by the [Employee’s Agency].

[Employee] asked the Commission if her request for an employee license, issued by the [Agency], would create a conflict of interest with her State job duties.

### **A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:**

#### **(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. After reviewing the pertinent facts and circumstances, the Commission did not see how [Employee]’s official judgment would be impaired by allowing her to comply with the additional licensing requirement instituted by her part-time employer. However, [Employee]’s supervisor, is responsible for approving or denying licenses following a background check and recommendation by [the other Division]. That meant [Employee]’s outside employment created a situation in which [Employee’s supervisor or co-workers] would be reviewing [Employee]’s license application. Ordinarily, the Commission would not permit a State agency to issue a license to one of its own employees. However, because [Employee]’s background investigation was conducted by employees of [a Division of another Agency] and not the [Employee’s Agency], and [the outside Division] recommended approval of the license application, this Commission decided that there was demonstrable independence of judgment in granting [Employee]’s license application.

The Commission emphasized the fact that their decision was based solely on these facts. It could not be extrapolated to include approval for other [Agency] employees seeking a [similar] license.

#### **(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. Nothing in the facts presented to the Commission indicated that [Employee] would be required to represent her part-time employer before the State. As a result, the Commission had no concerns about preferential treatment to any person.

#### **(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so, she was entitled to a strong presumption of honesty and integrity. Nor were there any facts to indicate that [Employee] would attempt to circumvent official channels. Indeed, the fact that she brought this matter to the Commission's attention was indicative of her desire to work within official channels.

**(4) any adverse effect on the public's confidence in the integrity of its government:**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. The Commission treats this provision as an appearance of impropriety standard. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality.

The [Agency's] operations in the State of Delaware are strictly regulated. [Employee] had worked for a [private employer] for almost 30 years. Her application for a license was a requirement forced upon her by [private employer]'s new management, even though [Employee]'s job duties had nothing to do with the [specific area requiring licensure]. In addition, her application was reviewed, and recommended for approval, by [a State agency] that was independent of her [Agency]. As a result, the Commission decided that it was very unlikely that [Employee]'s dual employment would create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee]'s part-time employment was in the evenings and on weekends, after her State work hours.

Motion—[Employee]'s outside employment did not create a conflict of interest with her State job duties. The [Agency]'s approval of [Employee]'s license was not a violation of the Code of Conduct under these particular facts. Moved—Commissioner Whetzel; seconded—Commissioner Moore. Vote 6-0, approved.

**10. Motion to go out of Executive Session:** Moved--Commissioner Manus; seconded—Commissioner Tobin. Vote 6-0, approved.

**11. Adjournment**—No December meeting due to conference.

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<sup>i</sup> Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.